Supreme Court, U.S.
FILED

941693 APR 17 1995

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

SOUTHERN CROWN, INC., PETITIONER

versus

BOARD OF ADJUSTMENT OF THE
CITY OF DALLAS, RESPONDENT

ON PETITION FOR A
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the provisions of the Dallas Development Code in question are void under the decisions of this Court in Eubank v. City of Richmond, 226 U.S. 137 (1912) and Washington, ex rel Seattle Title Trust Company v. Roberge, 278 U.S. 116 (1928) for violating Petitioner's rights of substantive due process and of equal protection under Section 1 of Amendment XIV to the Constitution of the United States?

2. Whether the right to seek legislative relief by seeking a change in zoning for a special permit provides a check upon the nonconforming use termination process so that the ordinance in question is not unconstitutional as the ordinances in the Eubank and Roberge cases?

3. Whether the provisions of the Dallas Development Code in question are void under the decisions of this Court in Eubank v. City of Richmond, 226 U.S. 137 (1912) and Washington, ex rel Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928) for violating Petitioner's rights of substantive due process and of equal protection under the Texas Constitution, Article I, Sections 3 and 19?

PARTIES TO THE PROCEEDING

All of the parties in the United States Court of Appeals for the Fifth Circuit are listed in the caption.[1]

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[1] There is no parent or subsidiary company of Petitioner.

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

SOUTHERN CROWN, INC., PETITIONER

v.

BOARD OF ADJUSTMENT OF THE
CITY OF DALLAS, RESPONDENT

ON PETITION FOR A
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner herein respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this action on February 3, 1995.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*, a-1) is not reported. The

District Court's opinion (App. B, *infra*, a-3 - a-22) is not reported. The judgment of the District Court (App. C, *infra*, a-23) is not reported.

2.

BASIS FOR JURISDICTION

The final judgment of the Court of Appeals was entered on February 3, 1995. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL AND ORDINANCE PROVISIONS INVOLVED

United States Constitution, Amendment XIV (Section 1)"

> "; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Texas Constitution, Article I, Section 3:

> "All free men, when they form a social compact, have equal rights,"

Texas Constitution, Article I, Section 19:

> "No citizen of this state shall be deprived of life, liberty, property, ..., except by due course of the law of the land."

Dallas Development Code, Section 51A-4.704:

> "Any person may request that the Board establish a termination date for a nonconforming use. Upon receiving such a request, the Board shall provide a termination date for the nonconforming use under a plan whereby the owner's actual investment in the structure(s) prior to the time that the use became nonconforming can be amortized within a definite time period. The following factors must be considered by the Board in determining a reasonable amortization period:
>
> > (A) The owner's capital investment in the structure on the property at the time the use became nonconforming.
> >
> > (B) The amount of the investment realized to date and the amount remaining, if any, to be recovered during the amortization period.

> (C) The life expectancy of the investment.
>
> (D) The existence or nonexistence of lease obligations, as well as any contingency clauses therein permitting termination of such leases.
>
> (E) Removal costs that are directly attributable to the establishment of a termination date.
>
> (F) Other costs and expenses that are directly attributable to the establishment of a termination date."

STATEMENT OF THE CASE

The Petitioner is the owner of a small motel in the City of Dallas, Texas. The motel was built as a new motel in 1986 and became a nonconforming use by change of zoning on July 18, 1989. Under the Dallas Development Code, a nonconforming use is a legal use of property which use may be continued indefinitely unless

terminated as provided for in the Development Code.

An application to terminate the nonconforming use was filed by the Skyline Heights Neighborhood Group represented by Carolyn Thompson. Neither Ms. Thompson nor Skyline Heights Neighborhood Group presented any evidence to the Board of Adjustment regarding the issues involved in this case, and neither is a party in this Court nor were they parties in the courts below. The Board of Adjustment voted to terminate the nonconforming use and established a termination date as of December 31, 1992.

This case is an appeal from the decision of the Board of Adjustment of the City of Dallas by writ of certiorari to the 116th Judicial District Court of Dallas County, Texas. The 116th Judicial District Court issued its writ of certiorari to review the decision of the

Board of Adjustment. The Board of Adjustment transferred the case to the United States District Court for the Northern District of Texas at Dallas.

The case was tried before the court without a jury. The trial court and the court of appeals affirmed the decision of the Board of Adjustment.

Petitioner contends that the decision of the Board of Adjustment was illegal and void and that the section of the Dallas Development Code under which the Board of Adjustment acted was void as being in violation of the Fourteenth Amendment to the United States Constitution and in violation of Sections 3, 17 and 19 of Article I of the Texas Constitution.

REASONS FOR GRANTING THE WRIT

1. THIS CASE PRESENTS THE IMPORTANT QUESTION REGARDING THE CONSTITUTIONAL REQUIREMENTS FOR TERMINATING NONCONFORMING USES UNDER THE DEVELOPMENT CODE OF THE

CITY OF DALLAS, TEXAS.

The City of Dallas, Texas is a city with a population in excess of one million people. The City has adopted a zoning ordinance (Dallas Development Code) which recognizes a nonconforming use as a legally permitted use under the zoning ordinance. A nonconforming use is a legal use of property under the zoning ordinance, but is not a legally conforming use under the current zoning regulations because of a change in the zoning regulations. There are many nonconforming uses in the City of Dallas.

Under the provisions of the zoning ordinance in question, any person may file an application with the Board of Adjustment to fix a termination date for the nonconforming use, and the Board of Adjustment must fix a termination date for the nonconforming use. On the date fixed by the Board of Adjustment, the use of

property must be discontinued.

The provision of the Dallas Development Code in question gives the Board of Adjustment no discretion as to whether or not a termination date shall be fixed when a request is filed with the Board, but provides the Board shall provide a termination date for the nonconforming use. This section makes and provides for selective termination of nonconforming uses, irrespective of the facts involved where the Board receives a request to terminate a nonconforming use. No standards or guidelines are placed in the ordinance as to when and under what circumstances a person may request the termination of a nonconforming use. This permits the termination of a nonconforming use at the whim or caprice of an individual or individuals who may be acting out of hatred, malice, reasons entirely unrelated to good zoning

practice, or even for the purpose of eliminating competition. Therefore, the right to continue to operate a nonconforming use under the zoning ordinance depends entirely upon whether or not someone does or does not file a request to terminate the nonconforming use. This discretion has been delegated to anyone. The ordinance would require a termination date to be fixed for a nonconforming use even if the adjacent property was used for a similar nonconforming use and for which no application had been made to terminate that use. Also, it would require a termination date to be fixed should an application be made irrespective of the uses being made by the surrounding property owners, even if the surrounding property owners use their property for the same purpose.

Article I, Section 3 of the Texas

Constitution and the Fourteenth Amendment to the United States Constitution guarantees equal rights and equal protection under the law. Article I, Section 19 of the Texas Constitution and the Fourteenth Amendment to the United States Constitution guarantees that no person's property rights shall be taken without due process.

2. THE COURT OF APPEALS DECISION IS IN CONFLICT WITH THE DECISIONS OF THIS COURT IN EUBANK V. CITY OF RICHMOND, 226 U.S. 137 (1912) and WASHINGTON, EX REL SEATTLE TITLE TRUST COMPANY V. ROBERGE, 278 U.S. 116 (1928).

In the present case, the ordinance in question permits any person to request the Board of Adjustment to fix a termination date. There are no standards or guidelines or requirements written in the ordinance as to when, under what circumstances, and for what reason a

person may make an application to have the Board of Adjustment fix a termination date. Once a request is made, the Board of Adjustment must fix a termination date. No discretion is vested in the Board to not fix a termination date.

In the case of Eubank v. City of Richmond, 226 U.S. 137 (1912), this Court held unconstitutional an ordinance that permitted property owners to determine a building line on property owned by others. Where an application was made by property owners, the Committee on Streets was required to fix a building line on property, the only discretion vested the Committee was to fix the building line set back between five and thirty feet. That ordinance permitted property owners to establish building lines on other person's property solely for their own interest or even capriciously. This Court held that such ordinance was unconstitutional under

the Fourteenth Amendment to the United States Constitution.

In the case of State of Washington, ex rel Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928), this Court held an attempted delegation of power to other property owners was a violation of the due process clause of the Fourteenth Amendment to the United States Constitution. In that case, the zoning ordinance made the right to maintain a home for aged persons within a particular district dependent upon the consent of the owners of two-thirds of the property within four hundred feet of the proposed building. In holding the ordinance to be unconstitutional, the Court said, to-wit:

> "The section purports to give the owners of less than one-half of the land within four hundred feet of the proposed building authority - uncontrolled by any standard or rule prescribed by the legislative action - to prevent the trustee from using its land for the proposed home.

> The superintendent is bound by the decision or inaction of such owners. There is no provision for a review under the ordinance; their failure to give consent is final. They are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily, and may subject the trustee to their will or caprice. Yuk Wo v. Hopkins, 118 U.S. 356, 366, 368 30 L.Ed. 220, 225, 226 6th Sup. Ct. Reporter 1064. The delegation of power so attempted is repugnant to the due process clause of the Fourteenth Amendment. Eubank v. Richmond, 226 U.S. 137, 143, 57 L.Ed. 156, 158, 42 L.R.A. (n.s.) 1123, 33 S.Ct. Reporter 76."

In the present case, the Board of Adjustment must fix a termination date where a request is made, irrespective of the reasons for the request or who made the request, and there is no provision for review by anyone as to whether or not the termination date should be fixed. The only discretion vested in the Board is the discretion in fixing the termination date based upon the factors written into the ordinance. The situation is the same as

it was in the Eubank case, supra, where the Street Committee had no discretion as to whether or not it would fix a building set back line, but its only discretion was the fixing of the line between five feet and thirty feet from the street.

The decision of the Court of Appeals in this case is contrary to the decision of this Court in the Eubank and Roberge cases.

3. THE COURT OF APPEALS ERRED IN HOLDING THAT THE RIGHT TO SEEK LEGISLATIVE RELIEF BY SEEKING A CHANGE IN ZONING FOR A SPECIAL PERMIT PROVIDES A CHECK UPON THE NONCONFORMING USE TERMINATION PROCESS SO THAT THE ORDINANCE IN QUESTION IS NOT UNCONSTITUTIONAL AS THE ORDINANCES IN THE EUBANK AND ROBERGE CASES.

The trial court in its opinion distinguished the Eubank and Roberge cases on the basis that the Petitioner could make application to the City of Dallas for

a special use permit, and specifically held that the opportunity to obtain a special use permit provides a check upon the termination process so that the ordinances are not unconstitutional as the ordinances in the Eubank and Roberge cases. The Court of Appeals affirmed the decision of the trial court without an opinion.

The lower courts in this case have held that the opportunity to seek a change of zoning on the subject property prevents the ordinance in question from being unconstitutional. In other words, the Court has held that the right to seek a legislative change in the zoning ordinance as it applies to the Petitioner's property prevents the ordinances in question from being unconstitutional. No authority is cited for this conclusion and we have been unable to find any.

A special use permit or specific use

permit is merely a change of zoning and requires the City Council to adopt an ordinance amending the zoning ordinance and granting the special permit, which is no different from any other change of zoning. Nichols v. City of Dallas, 347 S.W.2d 326, 331 (Ct.App.-Dallas 1961, writ ref'd n.r.e.). The adoption of an amendment to a zoning ordinance is a legislative act in Texas. Southern National Bank v. Austin, 582 S.W.2d 229, 238 (C.A.-Tyler 1979, writ ref'd n.r.e.); Texarkana v. Howard, 633 S.W.2d 596, 597 (C.A.-Texarkana 1982, writ ref'd n.r.e.). A change of zoning is not an administrative remedy which must be exhausted, it is a legislative remedy through a change in the law by a legislative body. In other words, the Court indicated that the Petitioner must seek legislative relief through the adoption of an amending ordinance by the

City Council before it could properly challenge the legality of the ordinance under which the Board of Adjustment fixed the termination date. We find no case so holding and we believe the Court erred in so concluding. Seeking a change in the ordinance should not be a prerequisite to challenging the legality of an ordinance.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

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ATTORNEY FOR PETITIONER
SOUTHERN CROWN, INC.

April, 1995

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 94-10256

SOUTHERN CROWN, INC.,
Plaintiff-Appellant,

VERSUS

BOARD OF ADJUSTMENT OF THE CITY OF DALLAS,
Defendant-Appellee.

Appeal from the U.S. District Court
for the Northern District of Texas
(3:91-CV-1954-P)

Before SMITH, BARKSDALE, and PARKER, Circuit Judges.

PER CURIAM:*

The court has reviewed the briefs, relevant authorities, and applicable

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* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

portions of the record and has heard the arguments of counsel. We find no violation of constitutional rights and no error in the designation of the termination date for the nonconforming use. Nor is there error in the other rulings of the district court.

The judgment, accordingly, is AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SOUTHERN CROWN, INC.	§	**[Filed:**
	§	**FEB 25 1994]**
Plaintiff	§	
vs.	§	
	§	
BOARD OF ADJUSTMENT	§	**Civil Action #**
OF THE, CITY OF DALLAS,	§	**3:91-CV-1954-P**
	§	
Defendant.	§	

MEMORANDUM OPINION AND ORDER

This case was tried before the Court without a jury on February 22, 1994 as an appeal from the decision of the Board of Adjustment of the City of Dallas, pursuant to §211.011 Tex. Local Gov. Code Ann. (Vernon 1988).

Background Facts

Plaintiff owns the Southern Crown Motel built in 1986 and located at 2303 Mouser Street, Dallas, Dallas County, Texas. Subject property was zoned Light Commercial ("LC") until July 18, 1989 when the zoning was changed to Community Retail

("CR"). Motels/hotels located in a CR district require a Specific Use Permit if they have less than 80 rooms. Plaintiff's use of the property became nonconforming in January, 1988 with the passage of the Special Use Permit requirement.

The Skyline Heights Neighborhood Group, represented by Carolyn Thompson, filed an application pursuant to Section 51A-4.704(a)(1) of the Dallas Development Code[1] to terminate the nonconforming use.

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[1] Any person may request that the Board establish a termination date for a nonconforming use. Upon receiving such a request, the Board shall provide a termination date for the nonconforming use under a plan whereby the owner's actual investment in the structure(s) prior to the time that the use became nonconforming can be amortized within a definite time period. The following factors must be considered by the Board in determining a reasonable amortization period:

(A) The owner's capital investment in the structure on the property at the time the use became nonconforming.

(B) The amount of the investment realized to date and the amount remaining, if any, to be recovered during the amortization period.

(C) The life expectancy of the investment.

(D) The existence or nonexistence of lease obligations, as well as any contingency clauses therein permitting termination of such leases.

(E) Removal costs that are directly attributable to the establishment of a termination date.

The Board of Adjustment, at its public hearing in Case no. DDA91T-102, on August 13, 1991, voted unanimously to terminate the nonconforming motel use and established a termination date of December 31, 1992. The Board of Adjustment further entered an order that the Building Official of the City of Dallas revoke the Certificate of occupancy authorizing the use of the property as a motel.

Discussion

Plaintiff appeals the August 13, 1991 decision of the Board of Adjustment. Plaintiff alleges that the decision of the Board of Adjustment was improper; illegal; and void and unconstitutional under the United States Constitution and the Texas Constitution. Plaintiff seeks a reversal of the decision by the Board of Adjustment

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(F) Other costs and expenses that are directly attributable to the establishment of a termination date.

and an order and decision holding that the ordinances under which the Board of Adjustment acts to terminate nonconforming uses are void and unconstitutional. Defendant seeks this Court to affirm the decision of the Board of Adjustment.

Standard of Review

The Court reviews the Board of Adjustment's decision to determine whether it abused its discretion. San Angelo v. Boehme Bakery, 144 Tex. 281, 190 S.W.2d 67 (1945); Bd. of Adjustment v. Flores, 860 S.W.2d 622, 626 (Tex. App.-Corpus Christi, 1993, writ denied, rehearing of writ of error overruled). The decision is not to be tested by the substantial evidence rule. Nu-Way Emulsions, Inc. v. Dalworthington Gardens, 617 S.W.2d 188 (Tex. 1981).

A board of adjustment abuses its discretion when it acts without reference to any guiding rules and principles or

acts arbitrarily and unreasonably; consequently, it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law. Flores, 860 S.W.2d at 626; See, Walker v. Packer, 827 S.W.2d 833, 839 (Tex. 1992); Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 241-242 (Tex. 1985). With respect to factual matters, the Court may not substitute its decision for that of the Board of Adjustment. Flores, 860 S.W.2d at 626, citing, Walker, 827 S.W.2d at 839. The decision of the Board of Adjustment is reversible only if the facts are such that the Board of Adjustment, as fact finder, could only have reached one correct decision and failed to do so. Id. The Court may reverse or affirm, in whole or in part, or modify the decision that is appealed. Tex. Local Gov. Code Ann. §211.011(f).

Dallas Development Code

The provisions of the Dallas Development Code require that the Board of Adjustment give the owner a reasonable opportunity to recoup the owner's actual investment in the nonconforming structure or in the nonconforming use at the time of the zoning change. Murmur Corp. V. Board of Adjustment, 718 S.W.2d 790, 797-98 (Tex. App.- Dallas, 1986, writ ref'd n.r.e.). The party seeking termination has the burden of proving the owner's actual investment in the nonconforming structure prior to the time the use became nonconforming, the costs associated with the termination of the nonconformity, and the amount of actual investment recouped by the owner prior to the time the use became nonconforming.

According to the Court in Murmur, "'Investment' is ordinarily used in the sense of cost--actual dollars, or their

equivalent, expended in exchange for the property in question--an amount susceptible of exact computation". Id. at 795. The Board of Adjustment should not consider market value, conformity costs, appreciation of the value of the land, the value of replacements or improvements, or profit from an advantageous acquisition in determining the amount to be recouped by the owner. Id. at 797-801. Actual investment does not include lost opportunity costs, future profits from the business, future amounts which could be realized by appreciation of the structure or use, or any other benefit the owner would realize if he were allowed to continue operation of the structure in its nonconformity. Id. at 797-801. Investment in the underlying land is not to be considered. Id. at 801. If the owner has any investment in the nonconforming structure, as distinguished from the land,

that has not already been recovered from use of the nonconforming structure, it is entitled to an opportunity to recoup that investment from utilization of the structure itself, by its continued operation or salvage or both, without regard to any profit it might realize from the sale of the land. Murmur, 718 S.W.2d at 801. Therefore, the owner's actual investment prior to the time of nonconformity includes; actual dollars, or their equivalent, expended in exchange for the nonconforming structure and\or use in question. Id. at 795. Also, the Board of Adjustment is to consider removal costs directly attributable to the regulatory effect of the ordinance as a credit to be made to the owner. Id. at 794.

Once the Board of Adjustment reaches a decision as to the amount to be recouped by the owner, the Board of Adjustment shall:

> [P]rovide a termination date for the nonconforming use under a plan whereby the owner's actual investment in the structure prior to the time the use became nonconforming can be amortized with a definite time period. The following factors must be considered by the Board in determining a reasonable amortization period:
>
> (A) The owner's capital investment in the structure on the property at the time the use became nonconforming.
>
> (B) The amount of the investment realized to date and the amount remaining, if any, to be recovered during the amortization period.
>
> (C) The life expectancy of the investment.
>
> (D) The existence or nonexistence of lease obligations, as well as any contingency clauses therein permitting termination of such leases.
>
> (E) Removal costs that are directly attributable to the establishment of a termination date.
>
> (F) Other costs and expenses that are directly attributable to the establishment of a termination date.

One issue before the Court is the question of whether or not to include the life expectancy of the motel in determining the amount to be recouped by Plaintiff. The Court interprets the statute and the case

law as requiring the life expectancy of the investment to be considered as a factor in determining the amortization period but not a factor to be considered in determining the amount of investment to be recouped. In other words, the life expectancy of the structure must be sufficient as to accommodate the amortization period fixed by the Board of Adjustment. If not, then the termination date would be unreasonable. In the instant case, the fact that the Southern Crown Motel had an extended life expectancy does not in and of itself add to the Plaintiff's actual investment ln the structure.

Review of the Board of Adjustment's Decision

Plaintiff advances two primary arguments contending that the Board of Adjustment used an unreasonable method of computing the amortization period. First,

Plaintiff argues that the Board of Adjustment used income from all of the assets of the Southern Crown Corporation in calculating prior recoupment of his investment. Plaintiff points out that the Southern Crown corporation had total assets with a book value of $710,377.80 as of December 31, 1987 while the value of the building was only $226,632.86. Plaintiff implies that the Southern Crown Corporation had income from sources other than the Southern Crown Motel and that it was improper to use income from the other sources to calculate the amount of investment recouped by the Plaintiff. However, Mr. Elias Martinez, Administrator of the Board of Adjustment, testified that in making his recommendations to the Board of Adjustment, he assumed that all the income on Plaintiff's income tax returns as supplied by the Plaintiff came from the operation of the Southern Crown Motel. Mr.

Martinez's assumption was correct as confirmed by the testimony of Mr. Patel, representative of Southern Crown Corporation. Furthermore, the evidence showed that, apart from the Southern Crown Motel, the Southern Crown Corporation had three tracts of raw land, none of which produced income. Therefore, the income figures relied upon by the Board of Adjustment were appropriately considered.

Second, Plaintiff argues that he should be allowed to recoup his entire investment in the Southern Crown Motel, including the purchase price of the land. According to the Plaintiff, it would be entitled to recover: $226,632.86 for the building, $99,881.97 for the land, $54,779.45 for building improvements, and $47,843.11 for equipment and furniture which totals $429,137.39. According to the ordinance, the owner is entitled to recoup his investment in the nonconforming

structure; the ordinance does not contemplate recoupment of land value. Murmur, 718 S.W.2d at 801. In fact, Plaintiff will continue to own the land and can use the land for a conforming purpose. Therefore, the amount of investment in the land should not be considered in the calculations by the Board of Adjustment. Thus, the Plaintiff's actual investment in the nonconforming structure prior to the date the use became nonconforming was $329,255.42. Plaintiff supplied a figure of $56,000 as the costs associated with termination of use. The amount of actual investment $329,255.42 plus $56,000.00 in costs associated with termination of use equals $385,255.42, the total amount to be recouped by Plaintiff.

The amount of investment previously recouped by the Plaintiff is determined by taking net income from operation of the Southern Crown Motel and adding

depreciation claimed on the building, equipment and furniture. According to the record, Plaintiff had net income of $380,141.19 for the years of 1986 through 1990. Depreciation on the building, equipment and furniture totals $149,041.78. Plaintiff argues that only depreciation on the building should be added to the net income. However, since the Plaintiff will recoup his investment in the equipment and furniture and continue to own the furniture and equipment, depreciation on those items must be considered as a part of the recoupment. Therefore, net income $380,141.19 plus depreciation $149,041.78 equals $529,182.97 or the total recoupment of actual investment realized by the Plaintiff based upon the evidence presented to the Board of Adjustment.

The total amount to be recouped by Plaintiff was $385,255.42. The total

amount recouped by Plaintiff was $529,182.97. Therefore, by the end of 1990, Plaintiff had recouped his actual investment in the building, equipment and furniture plus an additional $143,927.55.

Finally, the Board of Adjustment set the termination date of December 31, 1992, in an apparent attempt to deal with the issue of the time value of money as raised by Plaintiff's certified public accountant who testified before the Board of Adjustment. Again, the statute clearly states that the owner is to recoup his actual investment in the structure. Neither the wording of the statute nor the courts interpreting the statute has provided for the recovery of the time value of money. Under the circumstances, the Board of Adjustment's consideration of the time value of money does not render the decision unreasonable. In addition, Plaintiff has continued to operate the

motel for three years and two months since the end of 1990 when he had already recouped his investment in the nonconforming structure.

For the foregoing reasons, the Board of Adjustment did not abuse its discretion in setting the termination date of December 31, 1992.

Constitutionality of the Ordinances

Plaintiff argues that Sections 51A-3.102(c)(4) and 51A-4.704(a)(1) of the Dallas Development Code are illegal and void because they violate Plaintiff's equal protection and substantive due process rights under the Fourteenth Amendment to the United States Constitution and the Texas Constitution, art. I, §§ 3, 17. Also, Plaintiff argues that the action of the Board of Adjustment was an unreasonable exercise of police power in violation of the Texas Constitution, art. I, § 17.

Plaintiff cites the Court to United States Supreme Court cases of Eubank v. Richmond, 57 L.Ed. 156, 226 U.S. 137 (1912) and Washington ex rel Seattle Title Trust Company v. Roberge, 278 U.S. 116, 49 S.Ct. 50, 73 L.Ed. 210, 86 A.L.R. 654 (1928) as precedent for his constitutionality arguments. In each of these cases, the Supreme Court struck down as unconstitutional, ordinances which gave land owners a final say on another land owner's use of his own property. In these cases, the land owner's actions were final and not reviewable under the ordinances. Eubank and Roberge are distinguishable from the present case because the Dallas Development Code provides for the application to the City of Dallas for a special use permit for a land owner who has been subjected to the termination of a nonconforming use of his property. The record of the proceeding before the Board

of Adjustment shows that the Board of Adjustment advised the Plaintiff of its right to file an application for a specific use permit. The opportunity to obtain a special use permit provides a check upon the termination process so that the ordinances are not unconstitutional as the ordinances in Eubank and Roberge.

Furthermore, regulations that do not invade a fundamental right or discriminate against a suspect class are tested under the rational relationship test. Shelton v. College Station, 780 F.2d 475,477 (5th Cir. 1986); Lubbock Poster Co. v. Lubbock, 569 S.W.2d 935 (Tex.Civ.App.- Amarillo 1978, writ ref'd n.r.e.), cert. denied, 444 U.S. 833 (1979). The ordinances in question must be reasonable, not arbitrary, and have a fair and substantial relationship to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. Reed

v. Reed, 404 U.S. 71,76 (1971); Texas woman's Univ. v. Chavklintaste, 530 S.W.2d 927, 928 (Tex. 1975). All nonconforming uses in the City of Dallas are subject to involuntary termination regardless of the nature of the nonconforming use or the location of the nonconforming use. Under the ordinances, all owner's of nonconforming structures and uses are allowed to recoup their actual investment in the nonconforming structures and uses. Furthermore, they have the right to apply for a special use permit. The termination of nonconforming uses promotes the public health, safety, and general welfare. University Park v. Benners, 485 S.W.2d 773, 777-778 (Tex. 1972). The ordinances in question are rationally related to this legitimate state interest and therefore are not in violation of the equal protection clauses of the United States Constitution or Texas Constitution.

Finally, ordinances which provide for the termination of nonconforming uses and the owner's recoupment of actual investment do not effect a taking under the Texas Constitution, art. I, § 17 or the Fourteenth Amendment to the United States Constitution. Murmur, 718 S.W.2d at 798.

Conclusion

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Board of Adjustment's decision to set a termination date of December 31, 1992 for the nonconforming structure is **affirmed**.

SO ORDERED this the 25th day of February, 1994.

/s/ Jorge A. Solis
Honorable Jorge A. Solis
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SOUTHERN CROWN, INC.,	§	**[Filed:**
	§	**FEB 25, 1994]**
Plaintiff,	§	
	§	
	§	
VS.	§	**No.**
	§	**3:91-CV-1954-P**
	§	
BOARD OF ADJUSTMENT OF	§	
THE, CITY OF DALLAS,		§
Defendant	§	

JUDGMENT

This action came on for consideration by the Court, and the issues having been duly considered and a decision duly rendered,

It is ORDERED, ADJUDGED AND DECREED that the decision of the Board of Adjustment of the City of Dallas is affirmed.

SIGNED AND ENTERED this 25th day of February, 1994.

/s/ Jorge A. Solis
UNITED STATES DISTRICT JUDGE